

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TIM MARISSETTE

Claimant

VS.

HAYDEN TOWER SERVICE INC.

Respondent

AND

FREMONT COMPENSATION

Insurance Carrier

Docket No. **250,086**

ORDER

Claimant requests review of a preliminary Order entered by Administrative Law Judge Pamela J. Fuller on March 20, 2001.

ISSUES

The Administrative Law Judge's order denied claimant's request for medical treatment and further granted respondent's request for assessment of attorney's fees in the amount of \$1,300.

The claimant requested review of the inferred denial of compensability, denial of medical treatment and assessment against claimant of respondent's attorney fees.

The respondent briefed the issues of jurisdiction, compensability and assessment of attorney fees and costs.

FINDINGS OF FACT & CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The Board's jurisdiction to review preliminary hearing findings is statutorily created by K.S.A. 44-534a. The statute provides the Board may review those preliminary findings pertaining to the following: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3) whether notice was given or claim timely made; and (4) whether certain defenses apply. The Board also has jurisdiction to review preliminary hearing findings if it is alleged the administrative law judge exceeded the judge's jurisdiction. See K.S.A. 44-551.

In the instant case, the Administrative Law Judge denied claimant's request for medical treatment. The order does not specify the reason behind this denial. There is evidence in the file to indicate the denial could stem from the Judge's finding the claimant's accidental injury did not arise out of and in the course of the claimant's employment. There is also information in the file to indicate the Judge's denial could stem from a finding not contained in the jurisdictional items listed in K.S.A. 44-534a.

The Board recognizes the Workers Compensation Act does not specifically require the Administrative Law Judge to provide a statement of the basis for their preliminary hearing decisions. However, when benefits are denied and those benefits may have been denied because of a finding not subject to review, the Board cannot perform its obligations under the Act without an indication by the Administrative Law Judge as to the basis for the Judge's decision. As such the Board must remand this matter back to the Administrative Law Judge for further findings, specifically the basis for the denial of benefits, in order for the Board to make a decision regarding its jurisdictional basis for hearing this appeal.

It is the finding, decision, and order of the Board that this matter be remanded back to Administrative Law Judge Pamela J. Fuller for further findings consistent with this decision. The Board does not retain jurisdiction over this proceeding. Should either party be aggrieved by any amended order rendered by the Administrative Law Judge in this matter, the appropriate procedure for filing an application for review by the Board must be filed within the statutorily set guidelines.

At the preliminary hearing, the Administrative Law Judge also considered the respondent's motion for assessment of mileage expenses and attorney's fees against claimant for having to twice appear at scheduled preliminary hearings which were not held because the claimant did not appear. The Administrative Law Judge granted the respondent's request for attorney fees in the sum of \$1,300.

On review, the claimant contends that there is no provision within the Workers Compensation Act that authorizes an Administrative Law Judge to assess attorney fees against the claimant under these circumstances. Accordingly, it is alleged the Administrative Law Judge exceeded her jurisdiction.

The claimant contends that his failure to appear at the two previously scheduled preliminary hearings was due to a car accident and, secondly, due to inclement weather

conditions. The evidentiary record does not contain anything to contradict the claimant's explanations for his failure to attend the hearings. Moreover, at the second preliminary hearing the respondent's attorney conceded he had other cases on that day's hearing docket. The Board cannot consider the exhibits attached to respondent's brief because those documents were not introduced at hearing and are not part of the evidentiary record.

In any event, attorney fees in workers compensation cases are allowable only where expressly authorized by the Act. *Lackey v. D & M Trucking*, 9 Kan. App.2d 679, 687 P.2d 23 (1984). The legislature enacted K.S.A. 44-536 to provide for situations in which attorney fees are authorized under the workers compensation act. There are no sections of that statute which authorize assessment of respondent's attorney fees as a sanction against the claimant. The general rule in this jurisdiction is that attorney fees and expenses of litigation incurred by a prevailing party are not chargeable as costs against a defeated party in the absence of a clear and specific statutory provision therefor. *Walker v. Davis Van & Storage Co.*, 198 Kan. 452, 424 P.2d 473 (1967).

The respondent did not cite and the Board's research did not reveal any statutory authority in the Act for the Administrative Law Judge to assess attorney fees against the claimant as a sanction for failure to appear at a scheduled hearing. The Administrative Law Judge exceeded her jurisdiction assessing the attorney fees against the claimant and that finding is reversed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Pamela J. Fuller dated March 20, 2001, is remanded for further proceedings in accordance with the foregoing and reversed as to the award of attorney fees.

IT IS SO ORDERED.

Dated this _____ day of June 2001.

BOARD MEMBER

pc: Robert A. Levy, Attorney, Garden City, Kansas
Richard J. Liby, Attorney, Wichita, Kansas
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Workers Compensation Director